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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

NO. 460

WARREN STOWE McKILLOP,
Petitioner,

vs.

STATE OF IOWA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA AND BRIEF IN SUPPORT THEREOF.

CLARENCE I. SPENCER,
Counsel for Petitioner.

Mr. John Earl Gritton, and
Mr. Kalman Musin, both of
Des Moines, Iowa,
Of Counsel on the Brief.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Warren Stowe McKillop, petitioner herein respectfully states to the court as follows:

I.

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED.

Your petitioner, Warren Stowe McKillop a citizen of the United States and of the State of Iowa was charged with the crime of larceny under a County Attorney's information filed in the District Court of Guthrie County, Iowa on June 16th, 1949. (R. 2)

At the same time and on the same day being June 16th, 1949 a written plea of guilty was obtained from your petitioner. (R. 10)

Immediately and upon the same day he was sentenced by said court to the penitentiary at Fort Madison, Iowa for a term of not more than five years. (R. 12)

Petitioner was without the assistance of counsel at all times material to the matters herein involved and was unable to secure counsel until after he was imprisoned in the penitentiary. (R. 12, R. 14)

Within the time provided for by law, the petitioner herein appealed to the Supreme Court of Iowa from the judgment sentencing him to the said penitentiary. (R. 15)

II.

BASIS OF JURISDICTION.

The jurisdiction of this court is invoked under Title 28, Section 1257 and Section 2101 of the United States Code.

The petitioner herein submits that his conviction and sentence was in contravention of the Fourteenth Amendment to the Constitution of the United States and of the law relating to his case.

That he was unfamiliar with court procedure and was ignorant of his rights under the Fourteenth Amendment to the Constitution of the United States and of the law relating to his case and that he was without the assistance of counsel at and prior to the time of sentencing. (R. 12) That he was unable to secure counsel until after he was imprisoned in the penitentiary, (R. 12, R. 14) therefore the rights of the petitioner herein under the Fourteenth Amendment to the Federal Constitution was not raised in the court of first instance at or prior to the time of his sentence.

Subsequent thereto and after he was imprisoned in the penitentiary he was able to secure counsel and on Septem-

ber 21st, 1949 there was filed on his behalf with the court of first instance a motion. (R. 17) In said motion the rights of your petitioner under the Fourteenth Amendment to the Constitution of the United States was raised and which motion the trial court overruled. (R. 35)

The Federal questions of the right to "Assistance of Counsel" and of "due process of law" under the Fourteenth Amendment to the Federal Constitution presented here were submitted to the Supreme Court of Iowa by assignment of error at the time of appeal to that court. (R. 40, R. 41)

The decision of the Supreme Court of Iowa sought to be reviewed failed to consider or make determination of the constitutional rights of petitioner under the Fourteenth Amendment and bears date of May 2nd, 1950. (R. 43)

The petitioner herein filed within the time provided for by law his petition for rehearing. (R. 49) In the petition for rehearing his rights under the Fourteenth Amendment to the Constitution of the United States was again raised and submitted to that court. (R. 50, R. 53, R. 55) The petition for rehearing was "denied" on September 25th, 1950. (R. 42) The decision sought to be reviewed then became a final judgment.

The Supreme Court of Iowa decided the questions submitted to it in a way probably not in accord with the applicable decisions of this court and particularly as to the following decisions:

Robb vs. Connolly, 111 U. S. 624, 4 S.Ct. 544, 28 L. Ed. 542.

Powell vs. Alabama, 287 U. S. 45, 53 S.Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527.

Johnson vs. Zerbst, 304 U. S. 458, 58 S.Ct. 1019, 82 L. Ed. 1461.

Smith vs. O'Grady, 312 U. S. 329, 61 S.Ct. 572, 85 L. Ed. 859.

Glasser vs. United States, 315 U. S. 60, 62 S.Ct. 457, 86 L. Ed. 680.

Williams vs. Kaiser, 323 U. S. 471, 65 S.Ct. 363, 89 L. Ed. 398.

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Rice vs. Olson, 324 U. S. 786, 65 S.Ct. 989, 89 L. Ed. 1367.

White vs. Ragen, 324 U. S. 760, 65 S.Ct. 978, 89 L. Ed. 1348.

Hauck vs. Tulsa, 326 U. S. 271, 66 S.Ct. 116, 90 L. Ed. 61.

Van Moltke vs. Gillies, 332 U. S. 708, 68 S.Ct. 316, 92 L. Ed. 309.

Pierce vs. Pennsylvania, 325 U. S. 137, 60 S.Ct. 184, 65 L. Ed. 127.

The full opinion of the Supreme Court of Iowa herein sought to be reviewed appears on Pages 13 to 18 of the Record in this court and the order denying the petition for rehearing appears on Page 12 of the Record in this court. The opinion has not been published by the State in the official Iowa Reports. This cause in the Supreme Court of Iowa is entitled State of Iowa vs. Warren Stone McKillop, No. 47596 Docket 69 of the records in that court, (R. 13) and the opinion also is found in 42 N.W. 2d. 381.

III.

THE QUESTIONS PRESENTED.

The questions sought to be reviewed are:

1. That your petitioner was deprived of his liberty without due process of law by the filing of County Attorney's information on June 16th, 1949 charging the petitioner with the crime of larceny (R. 2) and the immediate sentenc-

and at time on the same date and at the same time to and upon Dan Rice sheriff in the penitentiary at East Station, and keep without the assistance of counsel, in contravention of the Fourteenth Amendment to the Constitution of the United States. (R. 12, R. 14) This Constitutional question was fully presented by assignment of error to the Supreme Court of Iowa (R. 40, R. 41) and again the Constitutional rights of petitioner under the Fourteenth Amendment was presented to that court in the petition for rehearing filed in that court (R. 49, R. 55, R. 56, R. 57) and which court failed to consider or make a determination thereof in the decision sought to be reviewed. (R. 59) The petition for rehearing was denied. (R. 59)

The right of the petitioner herein to the assistance of counsel and to have "due process of law" are rights granted by the Fourteenth Amendment to the Constitution of the United States which is the supreme law of the land and upon the Supreme Court of Iowa rested the duty and obligation to guard and enforce every right secured by that Constitution to the petitioner herein.

2. The court of first instance erred in failing to inform the defendant as to his rights under the Constitution of the United States and his rights under the law relating to his case and in further failing to inform the defendant that the waiver of right of counsel could be done only after a full and complete understanding by the defendant of his rights under the Fourteenth Amendment to the Constitution of the United States and the law of his case and in failing to make proper record thereof. (R 12, R. 14)

This question was fully presented to the Supreme Court of Iowa by assignment of error. (R. 40, R. 41) And again this question was presented in the petition for rehearing filed (R. 49, R. 55, R. 56, R. 57) in that court.

That court failed to consider or make determination

thereof in the decision sought to be reviewed (R. 13) and the petition for rehearing was denied. (R. 12)

This question is a right granted to the petitioner herein under the Fourteenth Amendment to the Constitution of the United States which is the supreme law of the land. On the Supreme Court of Iowa rested the duty and obligation to guard and enforce this right secured by that Constitution.

3. The court of first instance erred in failing to make inquiry whether the written plea of guilty was obtained from the petitioner herein under acts or circumstances that caused an overreaching of the judgment and the will of the petitioner herein and further to inquire whether said written plea of guilty was freely and understandingly made by the petitioner and to make a proper record thereof. (R. 12, R. 11) This question was fully presented to the Supreme Court of Iowa by assignment of error. (R. 40, R. 41) And again this question was presented in the petition for rehearing filed (R. 49, R. 56, R. 57, R. 64) in that court and which court failed to consider or make determination thereof in the decision sought to be reviewed. (R. 13) The petition for rehearing was denied. (R. 42)

This question is a right granted to the petitioner herein under the Fourteenth Amendment to the Constitution of the United States which is the supreme law of the land. On the Supreme Court of Iowa rested the duty and obligation to guard and enforce this right secured by that Constitution.

IV.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The petitioner was denied the right of due process of law by reason of his being informed against by County Attorney's information and immediately and on the same

day was sentenced to not more than five years in the penitentiary at Fort Madison, Iowa without the assistance of counsel in contravention of the Fourteenth Amendment to the Constitution of the United States.

The petitioner was denied the right to the assistance of counsel either by an effective appointment of counsel or by permission given by the court to the petitioner to employ counsel in contravention of the Fourteenth Amendment to the Constitution of the United States.

This case deals with the very core of due process of law and of the opportunity by the petitioner to be heard.

The petitioner herein was unable to defend himself and had no opportunity to be heard in the court of first instance.

The petitioner's complaint herein is fundamental involving the protection of the Fourteenth Amendment to the Constitution of the United States.

The petitioner was hurried to conviction with such expedition as to prevent due process of law. His guilt or innocence is not material insofar as the case is now concerned.

The petitioner was condemned without hearing and without the substance of a hearing and without the assistance of counsel.

The petitioner's plea of guilty under the circumstances simply emphasizes his need of counsel. The need of counsel is never greater that at the time of plea of the accused.

The petitioner was not schooled in the law, was charged with a crime and was in need of the guiding hand of counsel at every step in the proceeding against him.

Under the record presented it can fairly be said that the petitioner herein did not voluntarily waive his right to counsel.

Under the record presented of the criminal proceedings had, the gravity of the crime and other factors, the conduct of the prosecuting officials, the complicated nature of the

offense charged and the possible defenses thereto, all of which was had without counsel and which resulted in an injustice that is fundamentally unfair.

The benefit of counsel is essential to the substance of a hearing and a plea in this cause.

The conviction of the petitioner in this cause violated those "fundamental principles of liberty and justice which lie at the base of our civil and political institutions."

The decision handed down by the Supreme Court of Iowa failed to take into consideration and make a determination of the Federal Constitutional questions submitted to it and which questions are herein presented.

The Supreme Court of Iowa failed to protect the rights of the petitioner under the Fourteenth Amendment to the Constitution of the United States which is the supreme law of the land and upon that court rested the duty and obligation to guard and enforce every right secured by that Constitution to the petitioner herein.

Wherefore your petitioner respectfully prays that this his petition for writ of certiorari be granted; that writ of certiorari issue as by law provided; that the decision and judgment of the Supreme Court of Iowa in the case of *State of Iowa vs. Warren Stowe McKillop,* No. 47536, Docket 69 of the records in that court be reversed by this court and that your petitioner have such other and further relief as shall seem just and proper.

Respectfully submitted,

WARREN STOWE McKILLOP,
Petitioner,
By CLARENCE I. SPENCER,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

NO.....

WARREN STOWE McKILLOP,
Petitioner,

vs.

STATE OF IOWA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

REFERENCE TO REPORT OF OPINION OF COURT BELOW.

The opinion and decision of the Supreme Court of Iowa sought to be reviewed has not been published as yet by the State in the official Iowa Reports. This cause in that court is entitled *State of Iowa vs. Warren Stowe McKillop,* No. 47536 Docket 69 of the records of that court (R. 43) and the opinion is found in 42 N. W. 2d, 381. The full opinion and decision appears on pages 43 to 48 of the record of this cause in this court. The order denying the petition for rehearing appears on page 42 of the record in this court.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this court is invoked under Title 28 Section 1257 and Section 2101 of the United States Code.

Further the decision and opinion of the Supreme Court of Iowa sought to be reviewed here is in contravention of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE.

The petitioner, Warren Stowe McKillop, a citizen of the United States and of the State of Iowa was charged with the crime of larceny under a County Attorney's information filed in the District Court of Guthrie County, Iowa on June 16th, 1949. (R. 2)

At the same time and on the same day a written plea of guilty was obtained from the petitioner. (R. 10)

Immediately and on the same day he was sentenced by said court to the penitentiary at Fort Madison, Iowa for a term of not more than five years. (R. 12)

Petitioner was without the assistance of counsel at all times material to the matters herein involved and was unable to secure counsel until after he was imprisoned in the penitentiary. (R. 12, R. 14)

Within the time provided for by law the petitioner herein appealed to the Supreme Court of Iowa from the judgment sentencing him to the said penitentiary. (R. 15)

SPECIFICATION OF ASSIGNED ERRORS.

1. That your petitioner was deprived of his liberty without due process of law by the filing of County Attorney's information on June 16th, 1949 charging the petitioner with

the crime of larceny (R. 2) and the immediate sentencing of him on the same date and at the same time to not more than five years in the penitentiary at Fort Madison, Iowa without the assistance of counsel, (R. 12) in contravention of the Fourteenth Amendment to the Constitution of the United States. This Constitutional question was fully presented by assignment of error to the Supreme Court of Iowa (R. 40) and again the Constitutional rights of petitioner under the Fourteenth Amendment were presented to that court in the petition for rehearing filed in that court (R. 49) and which court failed to consider or make determination thereof in the decision sought to be reviewed. (R. 43) The petition for rehearing was denied. (R. 42)

The right of petitioner herein to have the assistance of counsel and to have "due process of law" are rights protected by the Fourteenth Amendment to the Constitution of the United States which is the supreme law of the land and upon the Supreme Court of Iowa rested the duty and obligation to guard and enforce every right secured by that Constitution to the petitioner herein.

2. The court of first instance erred in failing to inform the defendant as to his rights under the Constitution of the United States and his rights under the law relating to his case and in further failing to inform the defendant that the waiver of right of counsel could be done only after a full and complete understanding by the defendant of his rights under the Fourteenth Amendment to the Constitution of the United States and the law of his case and in failing to make proper record thereof. (R. 12, R. 14)

This question was fully presented to the Supreme Court of Iowa by assignment of error. (R. 40) and again this question was presented in the petition for rehearing filed (R. 49) in that court.

That court failed to consider or make determination thereof in the decision sought to be reviewed (R. 43) and the petition for rehearing was denied. (R. 42)

This question is a right granted to the petitioner herein under the Fourteenth Amendment to the Constitution of the United States which is the supreme law of the land. On the Supreme Court of Iowa rested the duty and obligation to guard and enforce this right secured by that Constitution.

3. The court of first instance erred in failing to make inquiry whether the written plea of guilty (R. 10) was obtained from the petitioner herein under acts or circumstances that caused an overreaching of the judgment and the will of the petitioner herein and further to inquire whether said written plea of guilty was freely and understandingly made by the petitioner and failed to make a proper record thereof. (R. 12, R. 14)

This question was fully presented to the Supreme Court of Iowa by assignment of error. (R. 40) And again this question was presented in the petition for rehearing filed (R. 49) in that court and which court failed to consider or make determination thereof in the decision sought to be reviewed. (R. 43) The petition for rehearing was denied. (R. 42)

This question is a right granted to the petitioner herein under the Fourteenth Amendment to the Constitution of the United States which is the supreme law of the land. On the Supreme Court of Iowa rested the duty and obligation to guard and enforce this right secured by that Constitution.

SUMMARY OF FACT AND OF LAW PRESENTED.

The petitioner was charged with the crime of larceny in a County Attorney's information filed on June 16th, 1949 (R. 2) and immediately and on the same day was sentenced to not more than five years in the penitentiary (R. 12) and at all times material he was without the assistance of counsel and was unable to secure counsel until after he was imprisoned in the penitentiary. (R. 12, R. 14)

The trial court failed to inform the defendant of his rights under the Constitution of the United States and of the law relating to his case and further failed to inform the defendant that waiver of his right to counsel could be done only after a full and complete understanding of his rights under the Fourteenth Amendment to the Federal Constitution and the law relating to his case and failed to make a proper record thereof. (R. 12, R. 14)

The court of first instance failed to make proper inquiry whether the written plea of guilty (R. 10) was obtained under acts or circumstances that caused an overreaching of the judgment and will of the petitioner herein and whether said written plea of guilty was freely and understandingly made by the petitioner and failed to make a proper record thereof. (R. 12, R. 14)

That the questions herein presented are rights granted by the Fourteenth Amendment to the Constitution of the United States which is the supreme law of the land and the petitioner was denied the assistance of counsel and "due process of law" in contravention of that amendment.

These questions were fully presented to the Supreme Court of Iowa by assignment of error. (R. 40) In the decision sought to be reviewed the Supreme Court of Iowa failed to consider or make a determination thereof. (R. 43) Thereafter these question were again fully presented in

the petition for rehearing filed (R. 49) which petition was denied. (R. 42)

Upon the Supreme Court of Iowa rested the duty and obligation to guard and enforce every right secured by the Federal Constitution, to the petitioner herein, and in the decision sought to be reviewed that court failed so to do. (R. 43)

The decision of the Supreme Court of Iowa sought to be reviewed here failed to give effect to and is probably not in accord with the decisions of this court hereafter cited and referred to.

ARGUMENT.

The petitioner submits that the record in this case makes a prima facie showing of denial of the Constitutional right of Assistance of Counsel and of "due process of law" under the Fourteenth Amendment.

In Iowa a County Attorney's information has the same force and effect as an indictment by a Grand Jury.

Section 769.2 Code of Iowa 1946 provides: "The county attorney may, at any time when the grand jury is not actually in session, file in the district court, either in term time or in vacation, an information charging a person with an indictable offense. * * *"

Such an information was filed against the petitioner herein in the court of first instance on June 16th, 1949 charging him with the crime of larceny. (R. 2)

At the same time there was filed a written plea of guilty (R. 10) and immediately and on the same day he was sentenced by the trial court, to not more than five years in the penitentiary at Fort Madison, Iowa. (R. 12)

The petitioner was without the assistance of counsel at all times material to the matters herein involved and was

unable to secure counsel until after he was imprisoned in the penitentiary. (R. 12, R. 14)

The Supreme Court of Iowa did not in its opinion and decision pass on the question of the rights of the petitioner herein to "assistance of counsel" and "due process of law" under the Fourteenth Amendment to the Constitution of the United States (R. 43) although said questions were fully presented to that court by assignment of error (R. 40) and in the petition for rehearing. (R. 49)

1. The decision of the Supreme Court of Iowa on the Federal questions raised under the Fourteenth Amendment to the Federal Constitution was necessary to a determination of this cause and upon that court rested the duty and obligation to guard and enforce every right secured by that amendment.

Robb vs. Connolly, 111 U. S. 624, 637. 4 S.Ct. 544, 551, 28 L. Ed. 542. "Upon the state courts equally with the Courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States, and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the state courts are required to take an oath to support that constitution, and they are bound by it and all laws made in pursuance thereof * * * as the supreme law of the land, * * *. If they fail therein and withhold or deny rights, privileges or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the state in which the question could be decided to this court for final and conclusive determination."

Mooney vs. Holohan, 294 U. S. 103, 113, 55 S.Ct. 340, 342, 79 L. Ed. 791. "Upon the state courts equally with the courts

of the Union rests the obligation to guard and enforce every right secured by that (Federal) Constitution."

Smith vs. O'Grady, 312 U. S. 329, 331, 61 S.Ct. 572, 573, 85 L.Ed. 859. "The (Federal) Constitution is the supreme law of the land and 'Upon the State Courts equally with the Courts of the Union rest the obligation to guard and enforce every right secured by that Constitution.'"

The Supreme Court of Iowa failed in the decision sought to be reviewed to give consideration to the rights of the petitioner under the Fourteenth Amendment and to make a determination thereof.

The Fourteenth Amendment to the Constitution of the United States provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 10, Article I, Constitution of State of Iowa, provides: "In all criminal prosecutions, and in cases involving the life, or liberty of an individual the accused shall have a right to a speedy and public trial by an impartial jury; to be informed of the accusation against him, to have a copy of the same when demanded; to be confronted with the witnesses against him; to have compulsory process for his witnesses; and, to have the assistance of counsel."

Section 775.4 Code of Iowa 1946 provides: "If the defendant appears for arraignment without counsel, he must before proceeding therewith, be informed by the court of his right thereto, and be asked if he desires counsel; and if he does, and is unable to employ any, the court must allow him to select or assign him counsel, not exceeding

two, who shall have free access to him at all reasonable hours."

In *Powell vs. State of Alabama*, 287 U. S. 45, 53, 53 S.Ct. 55, 58, 77 L. Ed. 158, this court said: "It is hardly necessary to say that the right to counsel being conceded a defendant then he should be afforded a fair opportunity to secure counsel of his own choice."

Williams vs. Kaiser, 323 U. S. 471, 473, 65 S.Ct. 363, 365, 89 L. Ed. 398. Williams the petitioner, had without the assistance of counsel pleaded guilty to an indictment charging him with robbery by means of a deadly weapon, this court said: "But the right to counsel in cases of this type is a right protected by the Fourteenth Amendment to the Federal Constitution. The question whether that federal right has been infringed is not foreclosed here even though the action of the state court was on the ground that its statute requiring the appointment of counsel was not violated."

The Supreme Court of Iowa did not state any grounds or reasons for its denial of the rights of the petitioner under the Fourteenth Amendment to the Federal Constitution and that court in the opinion sought to be reviewed made no decision or holding as to the rights of the petitioner under that Amendment. (R. 43)

Tomkins vs. Missouri, 323 U. S. 485, 489, 65 S.Ct. 370, 372, 89 L. Ed. 407. "The guiding hand of counsel is needed lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which they in fact or law committed."

White vs. Ragen, 324 U. S. 760, 764, 65 S.Ct. 978, 980, 89 L. Ed. 1348. "* * * It is a denial of the accused's Constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel."

Rice vs. Olson, 324 U. S. 786, 788, 65 S.Ct. 989, 991, 89 L. Ed. 1367. "A defendant who pleads guilty is entitled to the benefit of counsel and a request for counsel is not necessary. It is enough that a defendant charged with an offense of this character is incapable adequately of making his defense, that he is unable to get counsel, and that he does not intelligently and understandingly waive counsel."

Hawk vs. Olson, 326 U. S. 271, 278, 66 S.Ct. 116, 120, 90 L. Ed. 61. "We hold that denial of opportunity to consult with counsel on any material step after indictment or similar charge and arraignment violates the Fourteenth Amendment."

The petitioner herein was denied all opportunity to secure or consult with counsel by reason of the charge filed against him and the immediate sentence and incarceration in the penitentiary.

2 Story on the Constitution 4th Ed. Sec. 1949 P. 668. "The right of the accused to the presence, advice and assistance of counsel is necessarily included in 'due process of law'".

1 Cooley's Constitutional Limitations 8th Ed. 700. "With us it is a universal principle of Constitutional law that the prisoner shall be allowed a defense by counsel."

Commonwealth vs. O'Keefe, 298 Pa. 169, 173, 148, Atl. 73, 74, 75. "It is vain to give the accused a day in court with no opportunity to prepare for it, or to guarantee him counsel without giving the latter an opportunity to acquaint himself with the facts or law of the case. * * *

Every man is presumed innocent, and when accused, entitled to a reasonable opportunity to prepare his defense. A citizen cannot be deprived of due process of law, though ever so guilty; if he could, it would excuse mob violence. * * *

What we here decide is that to force a defendant, charged with a serious misdemeanor, to trial within five

hours of his arrest, is not due process of law, regardless of the merits of the case. * * *

We are constrained to hold that the haste shown in this case deprived the defendant of his constitutional rights, and the conviction cannot be sustained."

In *State vs. Magrum* (N.D.) 38 N.W. 2d 358, 360, that court said: "It is also clear that the failure of a trial court to provide an attorney for a defendant on his arraignment may in some instances deprive the defendant of 'due process of law' under the Fourteenth Amendment to the Federal Constitution and thereby render the judgment against him void. This is so if the conviction and incarceration are 'offensive to the common and fundamental ideas of fairness and right'."

In *State vs. Ferguson*, 226 Iowa 361, 372, 283 N.W. 917, 922 that court said: "Due process of law requires that the accused be properly charged by an indictment or information and be given adequate information in regard to the nature of the charge against him, that he be accorded representation by counsel, a jury trial in open court and that the State introduce such competent evidence which, if believed, would be sufficient to establish a defendants guilt beyond a reasonable doubt, without compelling the defendant against his will, to testify against himself." * * *

Punishment for the crime of larceny in Iowa is found in Section 709.2 Code of Iowa, 1946 as follows: "When the value of the property stolen exceeds twenty dollars, he shall be punished by imprisonment in the penitentiary not more than five years, or in the county jail not more than one year, or by fine of not more than one thousand dollars, or by both such fine and imprisonment; when the value does not exceed twenty dollars, by fine not exceeding one hundred dollars, or imprisonment in the county jail not exceeding thirty days."

These distinctions of the law as to punishment for the

crime charged were a closed book to the petitioner herein. He knew nothing of the different elements of the crime or the different punishments therefor. He was not schooled in the law. He received the maximum incarceration that could be imposed.

Powell vs. Alabama, 287 U. S. 45, 69, 53 S.Ct. 55, 64, 77 L. Ed. 158. "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable generally of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted on incomplete evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceeding against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or these of feeble intellect."

In *Williams vs. Kaiser*, 323 U. S. 471, 475, 65 S.Ct. 363, 366, 89 L. Ed. 398 this court said: "Those observations are as pertinent in connection with the accused's plea as they are in the conduct of a trial. The decision to plead guilty is a decision to allow a judgment of conviction to be entered without a hearing—a decision which is irrevocable and which forecloses any possibility of establishing innocence. If we assume that the petitioner committed a crime we cannot know the degree of prejudice which the denial of counsel caused. *Glasser vs. United States*, 315 U. S. 60, 75, 76, 62 S.Ct. 457, 467, 86 L. Ed. 680. * * * "Only counsel could discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense

would be appropriate. A layman is usually no match for the skilled prosecutor whom he confronts in the court room. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment."

Such is the reason why the right to counsel is fundamental and the denial of the right of counsel under the record presented herein is we believe "offense to the common and fundamental ideas of fairness and right," and in contravention of the Fourteenth Amendment to the Federal Constitution.

2-3. Now as to the written plea of guilty (R. 10) filed on the same date and same time as the county attorney's information (R. 2) a statute of the State of Iowa provides the manner and method by which a plea of guilty shall be made and entered.

Section 777.12 Code of Iowa, 1946 reads as follows: "The plea of guilty can only be made in open court and by the defendant himself in substantially the following form: 'The defendant pleads that he is guilty of the offense charged in the indictment', and shall be entered of record. The plea may be entered in vacation at the usual place of holding court in any county of the judicial district."

Inviting again the attention of the court to the plea of guilty. (R. 10) It overreaches the requirements of the statute. The defendant did not prepare that instrument. It is in the language of a lawyer and not of a layman. The petitioner herein is not a lawyer. The only lawyer of record in the case was the prosecuting attorney. The petitioner was confronted in the court room by a skilled prosecutor and he was without the benefit of, or the assistance of counsel.

The plea of guilty did not comply with the requirements of the statute. It went far afield insofar as the provisions of the statute are concerned.

The plea of guilty accepted by the trial court was not the free choice of the petitioner herein. It was the result of misleading advice given him by the prosecuting officials and it was the result of subverting factors. (R. 25, R. 26)

Johnson vs. Zerbst, 304 U. S. 458, 464, 465, 58 S.Ct. 1019, 1023, 82 L. Ed. 1461. "Courts indulge in every reasonable presumption against waiver of fundamental constitutional rights, and do not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." * * * "The Constitutional right of an accused to be represented by counsel invokes of itself, the protection of the trial court in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility on the trial judge of determining whether there is an intelligent and competent waiver by the accused. While the accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear in the record."

This was not done in the case at bar. No clear determination of an intelligent and competent waiver of counsel appears in the record of the case now presented. (R. 12, R. 14)

Glasser vs. United States, 315 U. S. 60, 69, 70, 71, 62 S.Ct. 457, 464, 465, 86 L. Ed. 680. "The guarantees of the Bill of Rights are the protecting bulwarks against the reach of arbitary power. Among those guarantees is the right granted by the Sixth Amendment to an accused in a criminal proceeding in a Federal Court 'to have the Assistance of Counsel for his defense.' 'This is one of the safeguards * * * deemed necessary to insure fundamental human rights of life and liberty' and a Federal Court cannot constitutionally deprive an accused, whose life or lib-

erty is at stake, of the assistance of counsel. *Johnson vs. Zerbst*, 304 U. S. 458, 462, 463, 58 S.Ct. 1019, 1022, 82 L. Ed. 1461. Even as we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of ones own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment. *Powell vs. Alabama*, 287 U. S. 45, 53 S.Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527. * * * To preserve the protection of the Bill of Rights for hard pressed defendants we indulge every reasonable presumption against the waiver of fundamental rights. * * *

* * * The trial court should protect the right of an accused to have the Assistance of Counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While the accused may waive the right to counsel whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record."

Johnson vs. Zerbst, 304 U. S. 458, 465, 58 S.Ct. 1019, 1023, 82 L. Ed. 1461. * * * "The purpose of the Constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution."

Von Moltke vs. Gillies, 332 U. S. 708, 721, 723, 724, 68 S.Ct. 316, 322, 323, 92 L. Ed. 309.

"A waiver of the constitutional right to the assistance of counsel is of no less moment to an accused who must

decide whether to plead guilty than to an accused who stands trial. See *Williams vs. Kaiser*, 323 U. S. 471, 475, 65 S.Ct. 363, 366, 89 L. Ed. 398. Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered. Determining whether an accused is guilty or innocent of the charges in a complex legal indictment is seldom a simple and easy task for a layman even though acutely intelligent. * * *

* * * We have said: The constitutional right of an accused to be represented by counsel invokes of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. To discharge this duty properly in the light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered."

We respectfully submit that there is no indication in

the record that McKillop intelligently and competently waived his right to counsel or that he understood the intricate legal problems involved in his indictment and conviction.

Further we respectfully submit that in the light of the cases herein cited the written plea of guilty (R. 10) was not a valid waiver by McKillop of his right to the Assistance of Counsel and of his right to due process of law, as granted to him by the Fourteenth Amendment.

In the opinion sought to be reviewed the Supreme Court of Iowa said: "Up to the time of taking appeal no objections had been made or exceptions taken by the defendant." (R. 44) We respectfully submit that this statement in the opinion only emphasizes the need of counsel by the petitioner herein at and prior to time of sentence. He had no knowledge of how to take exceptions or make objections at and prior to the time of his sentence and after the sentence exceptions and objections were of no avail. Surely the ignorance of the petitioner herein should not bar him from securing the rights granted to him by the Fourteenth Amendment.

Uveges vs. Pennsylvania, 335 U. S. 437, 440, 441, 69 S.Ct. 184, 185, 93 L. Ed. 127. "Some members of the Court think that where serious offenses are charged, failure of a court to offer counsel in state criminal trials deprives an accused of rights under the Fourteenth Amendment. They are convinced that the services of counsel to protect the accused are guaranteed by the Constitution in every such instance. See *Bute v. People of Illinois*, 333 U. S. 640, dissent, 677-679, 68 S.Ct. 763, 782, 783. Only when the accused refuses counsel with an understanding of his rights can the court dispense with counsel. Others think that when a crime subject to capital punishment is not involved, each case depends on its own facts. See *Betts v. Brady*, 316 U. S. 455, 462, 62 S.Ct. 1252, 1256, 86 L. Ed. 1595. Where the gravity of the crime and other factors—such as the age and edu-

cation of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair, the latter group hold that the accused must have legal assistance under the Amendment whether he pleads guilty or elects to stand trial, whether he requests counsel or not. Only a waiver of counsel, understandingly made, justifies trial without counsel."

Dillingham vs. United States (1935) CCA 5th 76 F. 2d. 36, 39. Commenting upon the fact that the defendant had waived his right to a jury trial without counsel and under extremely trying circumstances, the court said: "When, as here, defendant brings up a record which shows that he has not had the trial by jury which the Constitution guarantees, if waiver is relied on for affirmance, particularly if the waiver has been given without advice of counsel of his own selection, the record must clearly show that the waiver was formally and legally obtained upon a full explanation and understanding of his rights. * * *

* * * When it is claimed to sustain a felony trial resulting in a penitentiary sentence that the defendant has waived every safeguard the law accords him, such waiver must be better shown than it is here."

We respectfully submit that the petitioner had no opportunity in the court of first instance to obtain counsel of his choice and the court appointed none for him.

That the petitioner was condemned without a hearing and without the substance of a hearing. He was unable to defend himself and had no opportunity to be heard.

That the words of the courts in the cases cited herein speak most eloquently on behalf of this petitioner.

Of what value in the cause now presented is the Constitutional guaranty of a fair trial and of "due process of

law" if the accused does not have counsel to advise and defend him.

That in the decision sought to be reviewed the Supreme Court of Iowa failed to consider or determine the rights of the petitioner under the Fourteenth Amendment to the Federal Constitution and that those rights were fully presented to it by assignment of error.

Further we respectfully submit that the conviction and incarceration of the petitioner herein was "offensive to the common and fundamental ideas of fairness and right," and was in contravention of the Fourteenth Amendment to the Constitution of the United States.

That the petitioner had no opportunity to give considered judgment as to his situation and make proper decision as to the course he should pursue before the time of sentence.

CONCLUSION.

We respectfully pray that this Court grant the petition for writ of certiorari herewith submitted and that this cause be considered on the merits thereof; that the decision and judgment sought to be reviewed be reversed by this court and that such other relief be granted as to the court shall seem proper so to do.

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